



# Generally Speaking

## Comings and Goings

AAG **Craig Condie** has resigned his position in the Child Protection section in Anchorage.

**Dennis Cummings** was appointed district court judge in Bethel. His last day with the department was January 6. Dennis was acting district attorney in the Bethel DAO.

**Dolores Foote** joined the Palmer team in January as a law office assistant. Dolores previously worked in the Anchorage DAO.

On January 23<sup>rd</sup>, **Drew Groth** began work as an admin. clerk II in the Fairbanks DAO. Drew came to the department from Budget Rent A Car.

**Cathy Leaders** has left her interim position as law office assistant in the Kenai DAO. It's no coincidence that she has the same last name as ADA Scot, as she's his mother. The office greatly appreciated Cathy's help, and her willingness to step in until someone permanent for the position could be found.

**Ling Li** left the department's fiscal section for a promotion at H&SS on January 13<sup>th</sup>.

**Victoria Matthews** joined the Palmer team in January as a law office assistant. Victoria previously worked in the Bethel DAO.

**Bill McCord** has joined the Kenai DAO as office manager following more than 20 years in the U.S. Air Force. He is, as you can imagine, a force to be reckoned with.

**Bob Montgomery** joined the department as a paralegal in the Child Protection section in Fairbanks on January 3<sup>rd</sup>. Bob comes to the department from the Alaska Court System where he worked as a legal technician. Bob also gained paralegal experience while serving in the U.S. Army.

**Patti Runyan** was promoted to the position of paralegal in the Child Protection section in Anchorage as of January 3<sup>rd</sup>. Patti has been with the department since August 1999. Patti started as a law office assistant I in the Torts/Worker's Compensation section and was promoted to a law office assistant II in September 2000.

**Ann Vigil** was promoted to the position of law office assistant II in the Torts/Worker's Compensation section as of January 9<sup>th</sup>. Ann has been with the department since October 2002, and has served as a law office assistant I in the Torts/Worker's Compensation section for her entire tenure.

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**Dawn Walker** has joined the Kenai DAO as a law office assistant. She was formerly a supervisor at the Teen Center, and we'll have to see if she thinks it is harder dealing with a group of prosecutors than with a group of teenagers.

ADA **Michael Walsh** was promoted to the position of Acting D.A. in the Bethel office. Michael has been with the department since October 2002.

**Lindsay Wolter**, formerly of Seyfarth Shaw's Chicago office, joined the Environmental section in Anchorage on January 6<sup>th</sup>. During her three years at Seyfarth Shaw, Lindsay specialized in environmental law.

## CIVIL DIVISION

### Child Protection

#### **CINA Cases**

Many new Child In Need Of Aid (CINA) cases were opened since the last report as OCS has had to get involved to protect a number of children from dangerous conditions.

Several infants were taken into custody after testing positive at birth for one or more drugs. In a number of these cases, OCS tried to engage the mother in treatment, but had to assume custody when a lack of cooperation put the babies at risk. Some babies were so affected by their mother's drug use that doctors had to treat them for withdrawal symptoms. In other cases, a history of, or present, violence prevented OCS from considering the child safe at home.

Domestic violence was also a major issue in several cases where OCS has become involved. In one case, OCS is working with the mother to help her keep the child in her care and protect the child from the father. In other cases where domestic violence was a factor, both parents were

also intoxicated and placed under arrest. In some cases this month, altercations or assaults happened not only in front of children, but while one of the parents was holding a child or involved knocking over a child.

Drugs or alcohol was a factor in a number of cases. In one case, the father asked OCS to put his son in foster care while he sought treatment for his severe alcohol abuse problems. More commonly, the police bring a problem to OCS' attention. For instance, in one case, a father with a BAC of .186 went to pick up his children at school. The police then brought the children home only to find the mother intoxicated as well, with a BAC of .267. The children involved in that case were covered in bruises and suffering from neglect. In responding to a different call, the police discovered another child being neglected and left in unsafe conditions while the parent was intoxicated.

Alcohol or drugs is not always a factor in neglect cases. In one instance this month, OCS responded to a disturbing situation where a one and four-year-old were found in a filthy home, cold, and unfed. The older child reported being fearful of being in the home and also reported being hit by the mother. When the unsanitary conditions were not addressed and the treatment of the children was not improved after confronting the mother, OCS took custody.

OCS also took custody of children who had no other caregiver available. In one case, the child's adoptive parent (a biological grandparent) had died and no other relatives were available. In another case, a child was homeless due to his parent's substance abuse, domestic violence, neglect and the presence of sex offenders in the home. In a separate case, a mother refused to accept her child back into the home after release from the juvenile justice division.

OCS has also had to get involved due to a parent's mental illness putting the child at risk. In one such case, the mother failed to get the child necessary medical treatment.

OCS also took custody of several children to protect them from sexual abuse, from either the father or other children in the home. Where the mother remained supportive of the abuser or continued to expose the children to sex offenders, OCS had no choice but to take custody.

## **Miscellaneous**

The Child Protection section CLE was held this month at the Hawthorn Suites in Anchorage. There were two days of training and discussion on substance abuse issues (particularly methamphetamines), the implementation of the Family Rights Act, new CINA rules pertaining to discovery and guardians ad litem, guardianships of children, and a refresher on federal funding requirements for child protection cases. Steve Van Goor from the Alaska Bar Association provided ethics training, answering specific questions that had been posed to him. We also had a litigation and regulations update, including Mike Hotchkin's summary of the CINA cases decided by the Alaska Supreme Court over the past year.

## **Collections and Support**

The Child Support Services Division (CSSD) reached a \$100,000 settlement in an employer non-compliance/breach of settlement lawsuit with Northstar Energy Group. The managing partner of Gas-Pro, Northstar's predecessor, owed significant child support arrears. Gas-Pro failed to comply with wage and property withholding orders issued by CSSD. In 1999, Gas-Pro and CSSD settled the employer non-compliance lawsuit, but Gas-Pro failed to pay the settlement. In subsequent litigation brought by Northstar to remove CSSD's liens on property, CSSD counter claimed for breach of the settlement agreement. AAG Leroy Latta represented CSSD in the proceedings and successfully negotiated the resolution of the case. Northstar agreed to pay the principal amount of the entire settlement.

## **Commercial and Fair Business**

### **Consumer Protection/Anti-Trust**

**Ameritrust Settlement.** Our office, along with 49 other state Attorney General Offices, has entered into a \$325 million settlement with Ameritrust Mortgage Company. The settlement resolves allegations by the states that Ameritrust engaged in conduct with borrowers that amounted to predatory lending. Under the settlement, Ameritrust will pay \$295 million to consumers in restitution and will make sweeping reforms in its lending practices. Alaska consumers will receive approximately \$206,000 in restitution under the settlement.

### **Division of Corporations, Business and Professional Licensing (formerly Occupational Licensing)**

#### **- Hearings**

**Thompson.** An administrative hearing was held on January 12, 2006, in a case against James Thompson. Thompson is a general contractor who also holds a "residential endorsement" that allows him to build and remodel houses. There is a mandatory continuing education (CE) requirement that a contractor must meet to renew a residential endorsement. In his renewal application, Thompson checked a box asserting that he had the required CE, and his license and endorsement were renewed. The Division of Corporations, Business, and Professional Licensing conducted a CE audit of five percent of randomly-selected construction contractor licensees. When the division asked Thompson to produce proof of the CE that he claimed to have, he was unable to do so, but he later took a course that met the CE requirements. His contention at the hearing was that he should not be sanctioned because he ultimately obtained the required CE hours. Administrative Law Judge (ALJ) Dale Whitney took the case under advisement. AAG

Gayle Horetski represented the division at the hearing.

## **– Decisions**

**Platt.** Superior Court Judge Huguelet reversed a Board of Nursing's decision to deny a certified nurse aide license to Joy Platt based on a criminal history that included a felony forgery conviction. Ms. Platt received a suspended imposition of sentence for the conviction and subsequently the conviction was set aside. At the administrative hearing level, ALJ Andrew Hemenway determined that the board properly considered Ms. Platt's conviction, but he nonetheless recommended licensure. The board rejected the ALJ's proposed decision and after reviewing the record again denied licensure. Platt appealed to the superior court. Judge Huguelet determined that the board was precluded from considering the conviction because of the SIS, and reversed the board's decision. The board is appealing that determination to the Alaska Supreme Court.

**Harvey.** In an appeal of a real estate surety fund award, Superior Court Judge Tan, upheld, in part, a decision of the Real Estate Commission which found that licensee Duane Harvey had made misrepresentations in a real estate transaction and awarded the buyer in the transaction \$10,000 from the surety fund as a result. Payment of the award is not yet assured as Judge Tan held that it was error to preclude evidence at the administrative hearing regarding a statute of limitations defense raised by the licensee. Prior to the hearing, ALJ David Stebing determined that the statute of limitations had not run. At the hearing, he did not allow evidence to be taken on that issue. Judge Tan's decision remands the matter back to the commission to take evidence on the statute of limitations defense. A hearing on the statute of limitations is scheduled for April 2006.

## **– Briefs**

**Moser.** On January 13, 2006, the Real Estate Commission filed its appellee brief in Anchorage Superior Court in answer to the appeal filed by real estate broker Erwin Moser. In June 2005, following a hearing, the commission suspended Moser's license for 60 days because he falsely denied on his 2002 renewal that he had a lawsuit filed against him alleging dishonesty, fraud and conversion of funds. Moser (who obtained a stay of the suspension pending appeal) argued that he could not be disciplined for what he claimed was an innocent mistake. The commission pointed out that the scienter element for fraudulent misrepresentation or deceit required only that Moser know the falsity of the representation and that it was undisputed that Moser was aware of the lawsuit filed against him when he submitted the renewal. AAG Robert Auth is representing the commission in this administrative appeal.

## **Environmental**

The state's hard-fought revised coastal management plan to protect state coastal resources while providing for environmentally responsible development received final approval from the National Oceanic and Atmospheric Administration (NOAA). NOAA issued its final approval on December 29, 2005, confirming that Alaska's amended plan meets all federal requirements and standards. AAG Bruce Anders assists the Alaska Coastal Management Program.

AAGs Ruth Hamilton Heese and Cameron Leonard are assisting DEC in preparing the state's application for NPDES wastewater permit program primacy. The Governor signed SB 110 last August directing DEC to file the state's application before July 1, 2006. Cam is working on the required Attorney General's letter assessing whether the state has all of the requisite legal authority needed for the program. Ruth is assisting with development of regulations which must be adopted to include with the application.

AAG Rita Lovett (nee Hoffmann) and DAG Craig Tillery continue to work on EVOSTC issues as the reopener deadline approaches. Rita is also working with other state and federal agencies to assess natural resource damages incurred as a result of the *Selendang Ayu* grounding.

In December, DEC entered into a prospective purchaser agreement with Wal-Mart Stores in connection with Wal-Mart's purchase of the M-B Contracting Yard properties in the Muldoon area of East Anchorage. The site consists of 53 acres, a portion of which is contaminated with petroleum products and chlorinated solvents as a result of its prior use as a construction yard. As a condition of the state's covenant not to sue, Wal-Mart agreed to remove the underground storage tanks on the property, complete a cleanup of site contamination, and carry out long-term monitoring. Wal-Mart will also reimburse the state's costs in negotiating the agreement and DEC's oversight costs. Senior AAG Breck Tostevin assisted DEC with the transaction.

AAG Steve Mulder filed the state's appellee brief in *Alyeska Pipeline Service Co. v. DEC* pending in the state supreme court. At issue is whether Alyeska must pay DEC's costs (~\$100,000) incurred for Alyeska's administrative appeal of the VMT air permit terms or whether those program costs must be absorbed by all air permittees through emission fees.

## Human Services

### **Litigation**

We are currently locked in battle with the Northern Justice Project and Legal Services over how we administer two of our Medicaid Waivers. The litigation is *Pierce v. State*. Legal Services filed a preliminary injunction against the Medicaid Waiver program in June asking the court to stop the Division of Senior and Disabilities Services from terminating four recipients' Waiver benefits because the division failed to show medical improvement prior to terminating benefits. As currently administered, recipients of the Medicaid

Waiver program are reassessed yearly to determine if they meet the required level of care, and if they do not they are terminated from the program. There is no determination of improvement, which is the crux of the litigation. After motions, the court granted the preliminary injunction at the end of December. The state's motion for reconsideration was denied.

Due to the preliminary injunction, the state has stayed proceedings in two superior court cases raising the same issue and at least 10 administrative hearings. The division anticipates further stays will be necessary. The division has also stopped issuing denial letters to Waiver recipients who are going through their yearly re-assessment and have failed to meet the required level of care. On January 17, a class action was certified that includes two of the waiver programs: the Older Alaskan Waiver and the Adults with Physical Disabilities Waiver.

The Department of Health and Social Services is in the process of determining how it will deal with the situation in the long-term. The parties are currently discussing the possibility of briefing the issue of what "medical improvement" means in the class action, asking the superior court for a final judgment, and then taking the appeal to the Alaska Supreme Court. Chief AAG Stacie Kraly will be meeting with the DHSS Commissioner's office to discuss how to work through these issues in light of federal requirements for yearly assessment and the cost to the state to keep all parties on the Waiver pending a final decision by the court. This is a significant issue that will result in more litigation over the next few months.

Three new administrative appeals related to the Certificate of Need (CON) program have entered the litigation arena. All three are in front of ALJ Chris Kennedy and will require a lot of pre-hearing work over the next 60 days as the appellants, if they prevail, need to work within the short building season in Fairbanks. These appeals are the first based upon the new regulations, standards and methodologies adopted by the department this past summer. There is a

fourth administrative hearing looming, as well as our continuing battle with Dr. Bridges and Alaska Open Imaging over the CON program in general. This program will also be the subject of much debate this session. An initiative petition was just certified and there is legislation pending to limit the scope of the CON program.

## **Subrogation/Liens**

From January 1 through January 22, 2006, the section collected \$94,262.58 in Medicaid subrogation/lien payments as a result of eleven resolutions. There is \$363,744.70 in "accounts receivable" for matters that have been resolved and are awaiting payment. It is expected that \$107,667.00 of the foregoing amount will be received in the near future. At the present time, there is a caseload of 450 open matters and the closed matter count is now at 194.

## **Licensing**

The DHSS licensing program manager (Jane Urbanovsky) has asked AAG Rebecca Polizzotto to assist in drafting a policy and procedure manual for use by all licensing divisions for purposes of implementing SB125 (Licensing Medical or Care Facilities) and the new regulations. We are also currently assisting the department with transitioning licensing responsibility from OCS to the Division of Public Health with respect to residential child care facilities.

## **Labor and State Affairs**

### **Elections**

*Citizens for Ethical Government, William F. Fulton, Richard A. Sutton and Michael Busey v. State of Alaska, Division of Elections* (challenging the Division of Election's refusal to certify an application to petition for the recall of state Senator Ben Stevens). On January 4, Judge Stowers heard oral argument on the expedited cross motions for summary judgment and, ruling from the bench, upheld the Division of Election's

decision and dismissed the complaint. AAG Mike Barnhill handled this complaint.

***Review of application for recall of three members of the Alaska Gateway School District.*** Because the application did not satisfy the requirements of AS 29.26.260, the Department of Law recommended that the Division of Elections not prepare recall petitions. AAG Mike Barnhill assisted the division.

***Review of application for ballot measure.*** In a review of an initiative application proposing a ballot measure to amend the certificate of need requirement to apply only to facilities providing long term nursing home beds and residential psychiatric treatment centers, the department recommended that the Lieutenant Governor certify the application. (After certification, initiative sponsors are allowed to circulate initiative petitions and gather signatures in support.) AAG Sarah Felix reviewed this initiative.

**Employment.** Robert Hammond, former employee of Department of Transportation and Public Facilities (DOTPF) settled his Alaska Whistleblower action against the state for \$111,627.80. The action had been filed in 1996. The superior court had granted summary judgment in favor of the state on the basis of an arbitrator's ruling rejecting a union-filed employee grievance. The Alaska Supreme Court had reversed and remanded the case for trial. AAG Brenda Page handled the settlement.

## **General Services and Supply**

***State v. Bachner and Bowers.*** The state on January 13, 2006, petitioned the Alaska Supreme Court to review the superior court's decision in this bid protest from a procurement for office space in Fairbanks. The commissioner of Administration had determined that an impropriety occurred in the bidding process and awarded the protester his bid preparation expenses. After the bidder appealed from the administrative agency decision, the superior court concluded that the bid preparation expenses were not a sufficient remedy

and remanded the case to the commissioner to reconsider the remedy and to address the contract action. Because the court's decision exposes the state to additional liability to an innocent third party and because the court overlooked the availability of interlocutory remedies to the bidder to challenge and correct the impropriety before the contract was awarded, the state filed the petition, seeking review before the supreme court. AAG Margie Vandor is representing the state in this case.

## Labor and Workforce Development

An Occupational Safety and Health complaint against Columbia Helicopters, Inc. settled. It involved the death of a 21-year-old worker who was hit by a falling tree during logging operations on Dall Island in Southeast Alaska. Columbia admitted to five serious violations and payment of a fine of \$6,000. As a result of this case, AKOSH will be looking at its regulations concerning helicopter logging to address perceived deficiencies. Columbia and other companies will be invited and encouraged to participate in the regulation process. AAG Larry McKinstry handled this case.

After a three-day hearing about whether a combination boiler and hot water heater complied with the requirements for use in a residential development, Hearing Officer Dave Donley rejected the mechanical inspector's position and concluded that the device did not have to comply with hot water requirements. AAG Larry McKinstry represented the state.

## Retirement and Benefits

***Alaska Civil Liberties Union v. State of Alaska and Municipality of Anchorage*** (holding that the denial by the State of Alaska and Municipality of Anchorage of public employment-related health insurance and survivor benefits to employees' and retirees' same-sex domestic partners violates the equal protection clause of the Alaska Constitution). On January 5, 2006, the state filed its supplemental briefing on the issue of an

appropriate remedy. AAG Gina Ragle is handling this case.

***RPEA v. Matiasowski***. (Retiree health insurance case, claiming that 1999–2000 changes to the retiree health plan constituted a diminishment of benefits under art. XII, sec. 7 of the Alaska Constitution). The Alaska Supreme Court earlier held that health insurance benefits are benefits protected by article XII, section 7, and that it is the benefits themselves, rather than the cost of the benefits during the period of employment, that are protected. The court held that, to determine diminishment, the fact finder must analyze the comparative disadvantages and compensating advantages of any changes to the benefits, as they affect the entire group of employees (rather than the impact on individuals). A two-week bench trial on whether the changes diminished benefits began on January 17 before Judge Rindner. AAG Kathleen Strasbaugh represented the state, assisted at trial by AAG Anne Johnson and Associate Attorney Terry Begley-Allen.

## Workers' Compensation Appeals Commission

***Levine v. Republic Parking Systems, Twin City Fire Insurance, and the Commission*** (challenging legislation creating commission). Plaintiff filed a notice of dismissal without prejudice after settling the underlying workers' compensation claim. That settlement has to be approved by the Workers' Compensation Board. Although this "as-applied" challenge to the appeals commission appears to be over, a separate facial challenge remains. (Discussion of that case, *AKPIRG v. State*, is found in the Opinions, Appeals, & Ethics section entry.)

**Special thanks:** To Kathleen Strasbaugh, Anne Johnson, and Terri Begley Allen for their ongoing work on the trial in *RPEA v. Matiasowski*; to Randy Ruaro for his work on SB 132 (proposing changes to investigations, hearings, and orders of the State Commission for Human Rights); to Becky Allison and Kelly Gamble for grace under pressure.



## Legislation and Regulations

During January, the Legislation and Regulations section spent an active month editing draft legislation and bill amendments for the 2006 legislative session. The section assigned legislation to assistant attorneys general for review. The section edited the first bill review for the 2006 legislative session.

The section also performed legal reviews of several regulations projects including (1) Board of Fisheries (Chignik Area Commercial Co-Operative Fisheries; miscellaneous corrections); (2) Board of Pharmacy (miscellaneous amendments and fees); (3) Department of Environmental Conservation (fees for pesticides; vehicle emission inspection and maintenance; site specific water quality standard in Red Dog Creek); (4) Department of Administration (electronic disbursement of payments by the state); and (5) Department of Natural Resources (anadromous water atlas and catalog).

## Natural Resources

**Mental Health Trust Lands.** On behalf of the Mental Health Trust Land Office, AAG Sabrina Fernandez obtained a positive decision from the Office of Administrative Hearings. At issue was a protest appeal by an unsuccessful bidder regarding a request for proposals for the services of a professional forester to administer a timber sale contract. The administrative law judge, Andrew Hemenway, found that the protest appeal was not timely made. However, given the protestor's allegations of bad faith, consideration was given to whether the minimum requirements concerning helicopter logging experience were unduly restrictive. The ALJ found that the Trust Land Office failed to establish that the minimum criteria were reasonably necessary to meet the agency's actual needs, but that the project manager did not act in bad faith in crafting the minimum criteria. Given the untimely nature of the protest appeal, preparation costs were not awarded and the contract was not canceled.

**Natural Resource Conservation and Development Board.** AAG Steve Ross authored an informal AG opinion requested by Rep. Seaton concluding that the governor's appointments to the NRCDB are not subject to legislative confirmation. The opinion also concludes that NRCDB members are subject to the Executive Branch Ethics Act, and that board members serve at the pleasure of the governor and can all be removed at the same time if the governor so chooses.

### **DNR Office of Habitat and Management**

**Permitting.** AAG Steve Ross authored an informal AG opinion requested by the DNR commissioner concluding that the deputy commissioner has authority under AS 41.14.840 to require the submission and approval of plans and specifications for a fishway or other fish passage device before any dam or other obstruction is built across a fish stream. The opinion also clarifies that the deputy commissioner has the ability to exercise discretion under the statute, so long as that discretion is exercised consistent with the overarching statutory responsibility to ensure efficient fish passage and protect fish.

***Pasternak v. State.*** On January 24, the Anchorage Superior Court issued a decision affirming in all respects the Commercial Fisheries Entry Commission's decision in *Pasternak v. State, CFEC*, No. 3AN-03-9352 CI. The court held that Pasternak's challenge to the optimum number for the Northern Southeast Inside sablefish fishery and his equal protection argument were both foreclosed by *Simpson v. CFEC*, 101 P.3d 605 (Alaska 2004). The court also held that Pasternak failed to exhaust his administrative remedies by failing to seek administrative review of the hearing officer's decision. AAG John Baker represents the CFEC in this case.

### **Federal Subsistence Program Issues Continue.**

AAG Steven Daugherty assisted the Alaska Department of Fish and Game (ADF&G) with development of comments on fisheries proposals under consideration by the Federal Subsistence Board and attended a meeting of the Federal Subsistence Board (FSB) in Anchorage from



January 10 through January 13. Rejecting a request from the state to defer action until after the FSB has complied with directions from the Secretary of the Interior to develop written policies and guidelines for making Customary and Traditional Use (C&T) determinations, the FSB proceeded to make several C&T determinations.

Despite limited evidence of use and a perfunctory analysis of regulatory criteria, the FSB made a C&T determination for Ninilchik for salmon and trout in the Kasilof River drainage, and a separate C&T determination for Hope and Cooper Landing for the Kenai River drainage. The FSB also made a broad C&T determination for freshwater fish in Prince William Sound without showing use of specific drainages. Further, the FSB maintained a federal subsistence steelhead fishery on the Juneau road system, despite the fact that this is a nonrural area without any recent documented use by rural residents. The FSB also increased the bag limit for sockeye in the Kutlaku sockeye fishery while maintaining a closure to nonfederal users, maintained overly liberal size limits in Southeast Alaska steelhead and trout fisheries, and added provisions allowing use of bait in Southeast Alaska steelhead and trout fisheries despite ADF&G's conservation concerns.

On January 17, the FSB denied two requests for reconsideration filed by ADF&G in August of 2005. ADF&G had asked the board to reconsider an overly expansive C&T determination and an authorization of sale of bear parts prohibited under state law. AAG Steven Daugherty is continuing to assist ADF&G with these issues and with other issues related to the Federal Subsistence Program.

***May v. CFEC (Southern Southeastern sablefish longline fishery).*** AAG Stan Fields filed the state's brief in this 601 appeal of a CFEC decision denying May's application for an entry permit to the Southern Southeast Inside sablefish longline fishery in superior court on December 29, 2005. The court granted May's motion to have

the appeal heard by the same judge hearing his southeastern sablefish pot fishery appeal.

***May v. CFEC (Southern Southeastern sablefish pot fishery).*** AAG Stan Fields filed the state's appellee's brief January 17 in superior court in an appeal of a CFEC decision denying May's application for an entry permit to the Southern Southeast Inside sablefish pot fishery.

***Reutov v. CFEC.*** AAG Stan Fields filed another appellee's brief in superior court on January 24 in this appeal of CFEC's decision denying Reutov's application for a Prince William Sound salmon drift gillnet fishery entry permit.

**Board of Fisheries Meeting Coverage.** AAG Lance Nelson attended the 11-day Board of Fisheries meeting in Ketchikan, advising the Board and ADF&G on legal issues raised by the regulatory proposals considered by the Board, ethics, and procedural issues.

**Forestry Settlement.** In the final days of December, a Forest Resources and Practices Act violation was resolved. Sealaska had been charged with violating the Act, and its implementing regulations, in several ways. In essence, harvesting had occurred within the boundaries of riparian buffers in areas where no harvest was supposed to occur, under both the logging plan and by virtue of streamside protections built into the Act. The state and Sealaska agreed to resolve, rather than litigate, the issue and Sealaska agreed to pay a fine totaling \$32,600, the largest fine yet obtained in enforcing the Act. The resolution was approved by the assigned hearing officer on Dec. 29. AAG Kevin Saxby handled the enforcement action for the state.

## [Opinions, Appeals and Ethics](#)

The section filed several briefs this month in the Alaska Supreme Court.

***Benavides v. Alaska Legislative Council.*** AAG Dave Jones filed a brief for the state in this

case where a legislative aide is appealing the denial of his claim that he and all other legislative employees are entitled to per diem payments for each day they worked in Juneau during legislative sessions since 1993.

***Wetherhorn v. API.*** AAG Laura Bottger filed the state's brief in *Wetherhorn v. Alaska Psychiatric Institute*. This case challenged the propriety of the 30-day commitment and court-ordered medication of Wetherhorn during a recent manic episode of her bipolar disorder. Wetherhorn argues that the expanded gravely disabled standard under which she was committed is unconstitutional. API contends that the expanded commitment standard, which permits state intervention upon proof of severe and abnormal distress, significant impairment and substantial deterioration in function, is appropriate and that the constitution does not require the state to sit on its hands until tragedy is all but inevitable. Wetherhorn also challenged the conduct of the proceedings themselves, alleging that various procedural errors and her counsel's ineffectiveness amounted to a deprivation of due process.

***DIK.*** AAG Mary Lundquist filed a brief in an appeal from the termination of DIK's parental rights in *DIK v. State*. DIK argued that the state did not make active efforts because it failed to get DIK into specific programs recommended by the neuropsychologist. The state's position is that the neuropsychologist's recommendation was that DIK enter into these programs only if she remained sober and entered long-term substance abuse treatment, which she did not do, and that in any event, the state's extensive efforts over the length of this case satisfied the active efforts requirement. DIK also argued that the termination should be reversed because the children were not in permanent placements at the time. The state responded that this is not required, and that termination was in the children's best interest.

***Jeffery.*** Chief AAG Joanne Grace filed a brief in *State v. Jeffery*. In this case, two state court judges forgot to file declarations of candidacy for the 2004 general election. The Division of

Elections informed them that, under the clear mandate of Alaska's statutes and caselaw, it had no authority to put their names on the ballot. The trial court held that the judges did not have to file declarations with the Division of Elections, and the state appealed.

***M.M. & C.H.*** AAG Megan Webb filed her final brief in the state's appeal, *In the Matter of the Adoption of M.M. & C.H.* In this case, the trial court granted adoptions over the state's objections. The state objected because the adoptive parents had lost their foster care license after reports of harm. The supreme court has scheduled oral argument for early February.

## Other Matters

***AKPIRG v. State.*** Senior AAG Paul Lyle had oral argument on cross motions for summary judgment in *AKPIRG v. State*, a superior court case. In this case, AKPIRG seeks a declaration that the new Workers' Compensation Appeals Commission was unconstitutionally created in the executive branch because it functions as an appellate court reviewing decisions of the workers' compensation board. AKPIRG also claims that the legislature unconstitutionally withdrew the jurisdiction of the superior court to act as an intermediate appellate court in workers' compensation cases by providing for direct judicial review of appeals commission decisions in the Alaska Supreme Court in the legislation creating the appeals. Superior Court Judge Tan took the matter under advisement.

***Child Protection Conference.*** AAGs Megan Webb and Mike Hotchkin participated in the annual child protection conference held jointly by the Department of Law's Child Protection section and the Office of Children's Services. The conference is attended by all of the assistant attorneys general statewide with child protection responsibilities and by statewide OCS social worker supervisors. Mike and Megan participated in a panel presentation and update of legislative, regulatory, policy and procedure, and litigation issues, and they made a presentation on the

2005 appellate decisions in child protection cases. They also offered guidance to the conference participants regarding litigation strategies designed to optimize the state's chances of success on appeal and regarding how to succeed in advancing motions for reconsideration.

**James G.** The state prevailed in an appeal handled by Mike Hotchkin in a (CINA) case, *James G. v. State*. The state prevailed in its argument that the appeal was moot because the underlying CINA case had been dismissed when the trial court awarded full custody of the child at issue to the mother in a separate civil custody proceeding. The child's father disagreed, arguing that the trial court incorporated findings from the CINA case into its custody order. The supreme court withheld its decision in the CINA appeal until it decided the father's appeal in the custody case. In deciding the custody appeal, the court determined that the trial court had not done anything that required the supreme court to decide the issues presented in the CINA appeal, so it dismissed that appeal as moot.

For ethics matters, most of the work we do and advice we give is confidential by law. However, we can disclose that, in addition to work on other confidential ethics matters during January, AAG David Jones provided written advice to two former state employees and one current state employee about the Ethics Act's restrictions on their employment after leaving state service. He is also monitoring several bills proposing changes to the Ethics Act.

### Regulatory Affairs & Public Advocacy (RAPA)

#### **Stipulated Settlements**

**U-03-85, OTZ Telephone.** This was a standard rate case for OTZ Telephone Cooperative that provides local telephone service to the Kotzebue region. After filing of prefiled testimony, RAPA settled all outstanding issues because there were no controversial items that would benefit from further litigation. Settlement resulted in a

reduction to the basic rate increase proposed by the utility.

**U-05-12, IPEC.** This case was prompted by the transfer of Certificate from Tlingit-Haida Regional Electrical Authority (THREA) to Inside Passage Electric Cooperative (IPEC). THREA had been exempt from regulation as a political subdivision of the state under AS 42.05.711(b). After extensive discovery and prefiled testimony, RAPA negotiated a comprehensive resolution of all disputed issues related primarily to test year expenses (and pro forma adjustments to expense) and calculation of the margin component of the utility's revenue requirement. The utility agreed to file a cost of service study within nine months of RCA approval of the stipulation and file a depreciation study in 2008. At the time of reporting, the RCA had yet to act upon the filed stipulation.

#### **New Cases**

**U-05-84, Interior Telephone.** Interior Telephone Company (ITC) filed a proposal to restructure its local rates and to develop new (increased) rates for non-competitive areas under the local exchange competition regulations recently promulgated by the RCA. ITC proposes to establish separate rates for each exchange in anticipation of local competition from GCI in its Seward exchange. ITC primarily serves rural communities, including Cold Bay, Ft. Yukon and Port Lions. This is a case of first impression and it will likely implicate several other RCA dockets involving local exchange telephone competition issues. The AG/public advocate filed a notice of election to participate.

**U-06-02, Enstar/Marathon gas supply contract.** Enstar Natural Gas Company seeks approval of a gas supply agreement with Marathon Oil Company for provision of Cook Inlet gas from proven reserves beginning in 2009. RAPA filed extensive comments on the tariff filing that questioned the use of the Henry Hub Index as a gas price proxy, as well as related issues, and called for further investigation. The RCA

suspended the matter and the AG/public advocate filed a formal notice of election to participate.

**U-05-101 & 103, AWWU.** Effective January 1, 2006, the Anchorage Water and Wastewater Utility (AWWU) seeks a rate increase of 9% for water rates and a rate increase of 11% for sewer rates, respectively. The utility's request follows closely on the heels of the RCA adjudication of similar AWWU rate cases last year which the utility has appealed to the superior court. Consistent with AG advocacy, the commission excluded the MUSA on contributed plant from rates in those dockets, U-04-22 & 23, and awarded multi-million dollar refunds to Anchorage water and sewer ratepayers. The superior court has stayed the refunds pending the appeal. The AG/public advocate filed a notice of election to participate in the new dockets on January 17, 2006.

## Intervention Summary

As of January 23, 2005, RAPA was involved in eighteen dockets before the RCA. That number included sixteen adjudicatory matters in which the AG/public advocate had elected to participate as a party and two rulemaking proceedings in which RAPA has offered formal comments.

RAPA also monitors numerous matters before the RCA and provides policy analysis to the AG, and through the AG to the Governor's Office, as requested.

Most recently, the RAPA section chief participated, on behalf of the attorney general, in an energy briefing before the *Anchorage Daily News* editorial board. Also participating from the Administration were Ron Miller (AIDEA) and John Norman (AOGCC). The colloquy concentrated upon current issues and initiatives impacting fossil fuel supply (particularly natural gas) in the Railbelt, including RAPA's advocacy regarding the proposed Enstar/Marathon contract before the RCA, U-06-02.

## Torts and Workers' Compensation

**Board Victory.** The Workers' Compensation Board found for the state as employer in a case challenging the work-relatedness of an employee's carpal tunnel syndrome. In a hearing this month the board found for the first time that the employee's carpal tunnel syndrome was not caused by computer keyboarding. The employee was claiming that he was permanently and totally disabled due to work activities while employed by the state. The case was successfully defended by AAG Patti Shake.

**Helveston.** In *Helveston v. State*, an inmate filed a variety of claims alleging medical malpractice and negligent medical care. In two prior summary judgment motions, the majority of the claims were dismissed by the court. This month AAG Stephanie Galbraith moved for dismissal of the few remaining claims based on plaintiff's failure to exhaust his administrative remedies. Superior Court Judge Suddock granted the state's final motion resolving all the claims made by plaintiff.

**Olsen v. State.** In *Olsen v. State*, a civil case for damages filed by an inmate in Seward, plaintiff (through counsel) agreed to a voluntary dismissal of his excessive force claim against correctional officers. Plaintiff's agreement was reached after a videotape confirmed that the correctional officers used only necessary and reasonable force in restraining an uncooperative inmate. The case was litigated by AAG Stephanie Galbraith.

**MO&J: No Constitutional Tort.** In a Memorandum Order and Judgment (MO&J) the Alaska Supreme Court affirmed the dismissal of a claim brought by a criminal defendant against his public defenders. The plaintiff filed the civil lawsuit prior to his criminal case going to trial. Plaintiff alleged violation of his state constitutional rights. The court refused yet again to recognize the right to bring tort claims directly under the Alaska Constitution. The court found that under its usual test – which considers the existence of other

remedies for the perceived wrongs – the plaintiff could raise the issue of constitutional deprivation within the context of his pending criminal case, and any subsequent appeals or post-conviction relief actions. There was no need to recognize a new procedural remedy in this case. AAG Venable Vermont, Jr., represented the individual public defenders who were sued in this action.

### Transportation

**Case Completed.** Turning the Parks Highway into a freeway between the Glenn Highway interchange and Seward Meridian Road (location of Wal-Mart and Sears on the outskirts of Wasilla) involved several condemnations. AAG Jeff Stark represented DOT&PF before a master to determine the amount of compensation owed the people with interests in a particular property. After the master's hearing, the state appealed one of the master's findings to the superior court for a trial before a jury. This month, the parties settled that dispute and DOT&PF paid the final sums the parties determined were due.

**Personnel.** Rotary International Foundation president Carl-Wilhelm Stenhammar of Sweden appointed former Transportation Section Supervisor Carolyn Jones to the international organization's board of trustees. Carolyn is the first woman in Rotary International's history to hold this office. It is the highest office in Rotary International held by a woman. Carolyn worked for the Attorney General's Office for 23 years before her retirement in 1998. [*Anchorage Daily News* January 7, 2006]

## CRIMINAL DIVISION

### Anchorage DAO

**David Adams sentenced to five years in stabbing of drinking friends.** On May 8, 2004, Robert Galindo met the defendant David Adams at Carr's at 13th and Gambell. Later, the two met Helen

Akers. Galindo invited Adams and Akers back to his apartment to drink beer. In the apartment, David Adams attacked Galindo with a knife for no apparent reason. When Helen Akers tried to telephone the police, Adams stabbed her too. Adams then ran away. Police located him a few blocks away. Adams fought with police when they tried to arrest him. Police found the knife nearby. ADA John Skidmore won Adams' conviction in a jury trial of the two assaults in July 2005.

On January 9, 2006, Judge Michael Wolverton sentenced Adams to eight years in jail. He sentenced him to five years on each of the stabbings, with two and a half consecutive, for a total of seven and a half years. He sentenced him to six months for the assaults on the officers to run consecutively. And he imposed and suspended an additional two years for tampering with physical evidence for throwing away the knife.

**Cab hijacker sentenced to jail for assault on cab driver.** On May 15, 2005, James Vance got into a Checker cab at the Mush Inn and asked to be taken to the railroad station near Portage. When the cab driver asked him whether he had the money, Vance wrapped a rope around the cab driver's throat, held a knife to his throat, and told him to drive. As the cab driver was heading southbound on the New Seward Highway but still in Anchorage, the cab driver grabbed at the knife, at the rope, and at Vance with his right hand while he steered the cab to a stop with his left hand. An Anchorage police officer witnessed the struggle in the cab and followed it until it stopped. The driver got out of the cab and ran to the officer, yelling "He is trying to kill me." The driver had been cut in the face.

Vance stayed in the cab, refusing to come out when ordered to do so, both over the officer's loudspeaker and the cab's radio. Instead, Vance started shooting flames from one end of the cab to the other using an aerosol can and a lighter. The police called in APD's SWAT team and they got him out of the cab.

On January 7, 2006, Vance plead no contest to the assault and was sentenced to 36 months in jail with 28 suspended.

**Kwethluk man pleads to manslaughter in death of boatman on Kwethluk River.** On August 4, 2005, the Alaska State Troopers in Bethel called the Kwethluk Department of Public Safety to report that Frank Nicori, Jr.'s, brother had placed an order for bootlegged alcohol to be transported to Kwethluk. While looking out for the brother's boat, a Kwethluk officer and a Kwethluk VPSO saw Nicori driving a boat up the Kwethluk River, following closely a second boat. They saw that Nicori's boat was being driven erratically, almost hitting the second boat, and tried to flag Nicori down. But Nicori continued past them on the 30 to 40 foot wide river. The two officers then got in their own boat and tried to catch up with the two boats. The second boat stopped and its driver reported that Nicori was drunk. The two officers then tried to catch Nicori's boat. Nicori accelerated in his boat and went around a bend in the river. As the officers rounded the bend themselves, they saw that Nicori had crashed his boat into a third boat, one driven by David Martin. Martin suffered a head injury that resulted in his death. The officers caught Nicori and he was intoxicated. Damage and paint transfers between Nicori's boat and Martin's boat confirmed that the two had collided.

ADA John Novak, who was in the Bethel DA's Office to help out for the week, was assigned the case.

On January 18, 2006, Nicori plead to manslaughter in the death of David Martin under a plea agreement that he serve 15 years in jail (20 with 5 suspended). Sentencing is scheduled for June 7, 2006.

### [Fairbanks DAO](#)

January was a lot like December in Fairbanks. The Grand Jury returned 50 indictments for the month. Carlos Pena was indicted for manslaughter. At the time of the incident giving

rise to this indictment, Pena was on parole for his part in a Fairbanks homicide that occurred in 1994. He had been out on parole for approximately 14 months.

Among the 50 cases presented, seven were felony DUI and five were robbery in the first degree cases.

The Felony Unit received 29 cases in which arrests were made. Felony assault, drug and property crimes again lead the number of referrals. Only four of the arrests this month were for felony DUI.

The Misdemeanor Unit was extremely busy receiving 201 new cases. Of the 201 new cases, 73 were DUI arrests, 32 assault IV arrests, and 32 arrests for driving with license suspended. In addition, there were 56 arrests for miscellaneous misdemeanors and property offenses.

ADA Jenel Domke won a conviction of Lyndon Pasion for attempted sexual assault in the first degree. The trial was delayed for several months so the defendant could find an interpreter. Despite the witnesses and victim being intoxicated at the time of the event the jury was convinced by the victim's testimony. The defendant did not help his cause when he testified that the victim, who had passed out, encouraged him with the "look." The defendant displayed difficulty understanding Ms. Domke, as demonstrated by his waiting for the interpreter to repeat the questions, but he showed no problem understanding his attorney and answered questions before the interpreter completed the translation. He also did not seem to need an interpreter to scribble notes to his attorney during the examination of state witnesses.

### [Kenai DAO](#)

There were not many trials this month in Kenai but the ones that occurred all proved to be unusual. In superior court there was a second-degree murder trial that lasted almost three weeks. Jean Seaton handled the trial and did a grand job with a really tough case. The defendant was a woman who shot her significant other as a

result of what she characterized as a beating. However, the physical evidence did not support her claim.

Two unusual trials were conducted in district court: a stalking order violation case with a defendant who actually measured out the restricted distance but then stood a few inches past the line with a very large, very yellow, and very insulting sign; and an assault and indecent exposure case where the defendant is an inmate at the local detention facility. The assault was on a corrections officer and the indecent exposure was on a female employee of the facility. ADAs Lisa Thomas and Angela Jamieson, respectively, did the trials and won guilty verdicts within an hour of each other. These were hard cases and the convictions reflect their hard work.

### Kodiak DAO

A 35-year-old Kodiak man was sentenced in January for his earlier conviction for felony driving under the influence. He received a sentence of 24 months with 20 months suspended, a \$10,000 fine, permanent suspension of his driver's license, forfeiture of the vehicle he was driving, and five years on probation.

A 22-year-old Kodiak man was sentenced to six years with three years suspended and placed on probation for seven years following his conviction for misconduct involving a controlled substance in the third degree. This defendant had been one of three defendants arrested for operating a methamphetamine lab.

If only they were all this easy! After having admitting to his wife that he had sexual contact with his step-daughter, a 56-year-old Ouzinkie man called up the local trooper post and gave a full admission over the phone, after which he paid for his own airfare into Kodiak and turned himself into jail. Nearly immediately after his arraignment on his indictment, the man entered a guilty plea. A February sentencing date is pending.

### Kotzebue/Nome DAO

Willie Nashookpuk of Point Hope was accused of committing sexual assault II and incest against his niece while she was passed out. This case was four years old; nevertheless, the victim was still willing to testify about her uncle's contemporaneous sexual advances, and DNA found inside her after the assault matched that of her uncle. Nashookpuk defended by bringing in two experts from California, both of whom argued that Willie belonged to a cultural group too inbred to reliably sort out using DNA technology. The Kotzebue jury, comprised entirely of Alaska Natives, completely rejected this argument, returning guilty verdicts in less than one hour. Credit is due to Hayne Hamilton and Abi Chidambaram of the crime lab for helping this jury quickly navigate through the fog.

### Palmer DAO

The Palmer District Attorney's Office got off to a strong start in 2006, with three jury trials in January resulting in as-charged verdicts. Erik Barber was convicted of burglary in the second degree and theft in the third degree for stealing from Nagley's General Store in Talkeetna. (ADA Richard Payne) Daniel Levan was convicted of driving under the influence. (ADA Jarom Bangerter) James Stabenow was convicted of four counts of misconduct involving controlled substances in the fourth degree for growing marijuana at his home in Wasilla in 2005. (ADA Steve Wallace)

In addition to the above-mentioned trials, the trial in *State v. Cynthia Estes* was in progress at the time of reporting. Estes was charged as an accomplice to first-degree murder, arson, burglary and tampering with evidence. Estes' husband, Richard Deremer, was found guilty (in a separate trial) on November 17, 2005. ADA Suzanne Powell tried this case.

On January 27, 2006, Niobie Ewing was sentenced to serve 60 years in prison after



pleading no contest to second-degree murder. In 2004, after drinking and arguing with her boyfriend Tom Bourbeau, Ewing splashed gasoline on Bourbeau and the stairs leading out of the room he was in, and then ignited the accelerant. She walked down the street and called a neighbor to report the fire. It was Bourbeau's 56<sup>th</sup> birthday. Because he suffered from degenerative bone disease, deterioration of the spine, diabetes, high blood pressure, heart disease, liver disease and obesity, he could not make it out of the bedroom and died in the blaze. This case was handled by ADA Richard Payne.

On January 23, 2006, Emory Evern was sentenced to serve 12 years in prison, with 6 years suspended, and 10 years of probation for manslaughter, assault and DUI. The victim, George Newsham, an Anchorage attorney, and his friends were driving to go fishing when Evern struck them. Newsham's friends were injured, but survived the crash. Evern had a blood alcohol level of .275. ADA Rick Allen was assigned to the case.

44 people were indicted on new felony charges by the two Palmer grand juries.

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